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POLICE INTERROGATION: WARNINGS AND WAIVERS — WHERE DO WE GO FROM HERE?

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> Our attitude toward crime reflects our view of the value of the individual in society. In our deepest democratic and national commitments, we are a society of individuals. It is for the protection of individuals and of society that one who is accused of crime is deemed innocent until proved guilty and is afforded all the substantive and procedural legal safeguards. In protecting him, we protect ourselves. In a sense the entire system of criminal jurisprudence is "symbolic," since every part of it stands for something more than itself, namely, the preservation of the worth of each individual in a society of individuals. If we are to be true to our heritage at the same time that we struggle with the problems which beset us, we must deter not only crime, but also the debasement of the individual.[1]

I. Introduction

The indigent, illiterate, and the slow-witted in our midst, who are unaware of or ill-equipped to assert their rights constitute a large number of those suspected, arrested, and interrogated concerning criminal activity.[2] In finding certain police procedures frequently employed against these groups inherently coercive, and in holding that such procedures bring into play "one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself,"[3] the Supreme Court has implemented "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[4] Concerned with the preservation of human dignity and the promotion of equal justice under law during police interrogation regardless of whether the suspect be affluent, educated, and well-informed, or indigent, poorly schooled, and ignorant, the Court has proclaimed:

> [W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.[5]

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1 Bazelon, *Law, Morality and Civil Liberties,* 12 U.C.L.A.L. REV. 13, 28 (1964).

2 See BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951); A SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 80, 134-35 (1959). In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court was careful to point out that Miranda was an indigent Mexican who was seriously disturbed with pronounced sexual fantasies. Stewart is described as an indigent Negro who had dropped out of school in the sixth grade. *Id.* at 457.

3 *Id.* at 457-58.

4 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

5 Miranda v. Arizona, 384 U.S. 436, 469 (1966). In State v. Naglee, 44 N.J. 209, 207 A.2d 689 (1965), the accused was a police officer, causing the New Jersey Supreme

These principles were applied recently in four cases concerning police interrogation in which the Supreme Court implemented the fifth amendment's privilege against self-incrimination and the sixth amendment's right-to-counsel rationale of *Escobedo v. Illinois*.[6] The facts of three of these cases follow.

A. Miranda v. Arizona[7]

Ernesto Miranda was arrested, removed from his home, and taken to a police station where he was identified by the complaining witness as her kidnapper and rapist. The police then proceeded to question him in an "interrogation room." After two hours the officers returned with a written confession signed by Miranda. At the beginning of this confession, a paragraph read "that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.' "[8]

B. Vignera v. New York

Michael Vignera was taken into custody in connection with a three-day-old robbery and removed to a detective headquarters. He was then taken to a second squad room where, in response to questioning, Vignera orally admitted the robbery. While at the second site he was identified by two eyewitnesses as the robber. He was then formally arrested and removed to a third station, where an assistant district attorney questioned him further in the presence of a stenographer, who recorded the questions and Vignera's responses.

C. Westover v. United States

Carl Westover was arrested by police as a suspect in two local robberies. He was taken to the police station; placed in a lineup; and two hours after the initial arrest, booked. The police questioned Westover on the night of his arrest, but he denied any criminal activity. The next morning local officials continued the questioning. At about noon, in response to a Federal Bureau of Investigation report that Westover was wanted in connection with two bank

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Court to write: "Unlike most suspects, the defendants here were intimately associated with law enforcement and it would be unreasonable to assume that they were not aware of their rights in this situation." *Id.* at 222, 207 A.2d at 696. *Naglee* could not be decided the same way under *Miranda,* and the mere fact that a suspect is a police officer does not excuse the warning's not being given. The *Naglee* result followed where the suspect was a "professional criminal." See, *e.g.,* State v. Taylor, 270 Minn. 333, 133 N.W.2d 828 (1965); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965) (*per curiam*); Seymour v. Maxwell, 3 Ohio St. 25, 208 N.E.2d 922 (1965). Since *Miranda,* these cases no longer retain any vitality.

6 378 U.S. 478 (1964). Although some commentators and judges claim to be astonished by this shift in approach, the effective assistance of counsel required by *Escobedo* was merely a prophylactic device to insulate a suspect's absolute right not to be compelled to incriminate himself. Miranda v. Arizona, *supra* note 5, at 469. See also Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 OHIO ST. L.J. 449, 489 (1964); oral argument of William A. Norris for Roy Stewart in MEDALIE, FROM *Escobedo* TO *Miranda:* THE ANATOMY OF A SUPREME COURT DECISION 182 (1966). For an excellent historical refutation of the minority position in *Miranda,* see Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the New Fifth Amendment and the Old Voluntariness Test,* 65 MICH. L. REV. 59 (1966).

7 384 U.S. 436 (1966). The four cases, *Miranda v. Arizona, Westover v. United States, California v. Stewart,* and *Vignera v. New York,* were all decided under the title *Miranda v. Arizona.*

8 Miranda v. Arizona, *supra* note 7, at 492.

robberies in California, the local police informed the F.B.I. that they could question the suspect. Three agents then commenced their interrogation in an "interview room"; prior to being questioned Westover was, however, warned that "he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney."[9] Approximately two and one-half hours later, Westover signed two separate confessions, one for each of the bank robberies. Subsequently he was tried in federal court and convicted of both California crimes.

II. The Court's Decision: The Warning Requirement

In each of these cases the suspect was deprived of his freedom and placed in surroundings that rendered it difficult for him to avoid being questioned and incriminating himself. The Supreme Court found each of these situations "inherently coercive" and held that the right not to be compelled to incriminate oneself could best be vouchsafed if prior to any questioning the police were required to give each defendant the following four-part warning:

1. that he has the right to remain silent;[10]
2. that anything he says can be used against him in a court of law;[11]
3. that he has the right to the presence of an attorney;[12] and
4. that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[13]

This four-pronged warning is a prerequisite to any custodial questioning by the police, and the right to the warning accrues when a person is placed in custody or deprived of his freedom of movement in any significant way.[14] Although after these warnings have been given, the suspect may knowingly, rationally, and intelligently waive his rights, if the police fail to give these warnings, or if they do warn him but he does not effectively waive his rights, any evidence derived "as a result of" the interrogation cannot be used against him.[15] In addition to this standard warning, the suspect should also be informed of the nature of the crime involved, since the seriousness of the offense is relevant in determining whether or not to speak. Without that knowledge it is doubtful that the suspect could effectively waive his rights.

III. Appointment of Counsel

Miranda requires that an impecunious suspect be advised of his right to the appointment of counsel and to have that counsel present during any inter-

9 *Id.* at 495.
10 *Id.* at 468.
11 *Id.* at 469.
12 *Id.* at 471.
13 *Id.* at 473.
14 *Id.* at 478-79. The term "significant" appears to drop out after it is initially mentioned, *id.* at 444, in the majority opinion. The Court talks about an individual being "deprived of his freedom of action in *any* way." *Id.* at 477. (Emphasis added.)
15 *Id.* at 479.

rogation.[16] The American Law Institute in its Model Code of Pre-Arraignment Procedure found there was no affirmative duty on the part of the state in its system of criminal justice to relieve the consequences of "poverty, ignorance and psychological deprivation."[17] Thus, it found no social or moral obligation to appoint counsel for the indigent prior to the commencement of judicial proceedings.[18] The Model Code did provide, however, that *retained* counsel would be permitted to be present during interrogation even though a suspect who was not fortunate enough to have family, money, or sophistication "would have to go it alone."[19]

Does the Government have any duty to the indigent in the administration of criminal justice? The Attorney General's Committee on Poverty and the Administration of Criminal Justice eloquently set forth the answer:

> The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, *may occasionally* affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.[20] (Second emphasis added.)

Perhaps if the state were a neutral rather than an adversary there would be no such duty owed the indigent. Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit went to the heart of the matter when he wrote that

> police detention and interrogation are not "neutral" state acts. Their primary effect, unless counsel is provided, is to elicit damaging admissions from suspects. . . . If the state subjects all suspects to detention and interrogation, it is only a pretense of "neutrality" to permit those able to retain counsel to protect their rights effectively while refusing to provide equal protection to the poor and inexperienced.[21]

At least one jurist has interpreted the most persuasive plea for the appointment of counsel in the police station as requiring a rule prohibiting the

16 *Id.* at 472-73.
17 MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 5.01, comment 1(d) (Tent. Draft No. 1, 1966).
18 *Ibid.*
19 See *id.* § 5.07 and § 5.07, comment 2(d).
20 U.S. Att'y Gen.'s Comm., Report on Poverty & the Administration of Federal Criminal Justice 9 (1963).
21 Letter of Judge David Bazelon to Attorney General Nicholas deB. Katzenbach, reprinted in Kamisar, *Has the Court Left the Attorney General Behind? — The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice,* 54 KY. L.J. 464, 487 (1966).

assistance of counsel for the affluent and sophisticated if counsel were not appointed for the indigent and ignorant as well.[22] Such reasoning according to that critic collides with the general (arbitrary seems more appropriate) rule that even "upon nonjudicial contact with officials, no man who is the target of a criminal proceeding can be denied the right to have advice of counsel, actually produced."[23] It seems clear, however, that the proponent of assigned counsel was operating on the premise that, once procedural rights are achieved for the rich man, the "equality norm" exerts pressure to provide all with the same rights.[24] But equality in the administration of criminal justice cannot be achieved by reducing the rights of the most fortunately endowed suspects to the level of the least fortunate. It would be a perversion of the constitutional scheme — not to mention a denial of due process of law — to deny retained counsel's access to his client solely because another suspect similarly situated has no attorney. Is it any the less a perversion for the state to take no affirmative action to insure that this inequality does not prevail? It is, of course, most disturbing to deny access to retained counsel in order to "promote equality," but is there any basis for complacency when the very person who is most in need of assistance cannot obtain it because he does not know or cannot afford to do so?[25]

The position of the American Law Institute was properly put to rest when the Supreme Court in *Miranda* indicated that "denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by *reason* or *logic* than the similar situation . . . in *Gideon v. Wainwright* . . . and *Douglas v. California* . . . ."[26] (Emphasis added.)

Under *Miranda* it is essential that the suspect be advised that counsel will be appointed if he cannot afford to retain one. In *People v. Witenski*[27] two teenaged defendants were told by a justice of the peace that if they requested he

22 Breitel, *Criminal Law and Criminal Justice,* 1966 UTAH L. REV. 1, 9, commenting on Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* in CRIMINAL JUSTICE IN OUR TIME (1965).

23 *Id.* at 9. The author calls the rule "long standing," a somewhat surprising statement in light of the fact that Escobedo v. Illinois, 378 U.S. 478 (1964), which gave constitutional validity to the rule was decided in 1964 and People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), the New York case that was relied on in *Escobedo,* was decided in 1963.

24 Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 19 (1964).

25 It was in this spirit that Professor Kamisar reached the so-called dryly logical extreme. In his commentary on the Bazelon-Katzenbach exchange, Kamisar isolated the issues:

> The issue is not whether poverty, ignorance or instability should be a *substantive* defense against criminal liability but whether these factors should be permitted to inhibit the proper and effective assertion of *procedural* rights *once* the criminal process has begun. The issue is not whether we should *give* the poor and ignorant so many points *because* they are poor and ignorant, but whether, because they suffer from these deficiencies, we should *deprive* them of rights and privileges they are entitled to in the abstract. Presumably these rights and privileges manifest goals and policies transcending the pursuit of alleged criminals.
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> The issue is not whether the government should ignore crime caused by poverty and ignorance, but whether with respect to the assertion of the privilege against self-incrimination or the right to counsel or the protection against unreasonable search and seizure, the government should exploit the influences of poverty or ignorance — or seek to minimize them. The issue is whether, once the administration of criminal justice has begun, the government "should take the country as it is." Kamisar, *supra* note 21, at 472.

26 Miranda v. Arizona, 384 U.S. 436, 472-73 (1966).

27 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

would contact their chosen attorney anywhere in the jurisdiction. This statement implied that the defendants had a right to counsel only if they supplied him. In reversing the conviction, the New York Court of Appeals discussed the standard warning and went on to call for more than "a mere formulistic recital"[28] of legal language. Similarly the warning given to Carl Westover by the Federal Bureau of Investigation would be insufficient, since the agents only informed him that he had the right to see an attorney, while failing to advise him of his right to assigned counsel.[29]

A. Custodial Interrogation

The term "in custody," which gives rise to the necessity for a warning, at least encompasses detention in a police station, so there should be little difficulty in determining when a suspect is "in custody." The companion phrase, "or otherwise deprived of his freedom of action in any significant way," must await further definition by the courts. Three situations come to mind: (1) home interrogation; (2) street interrogation (stop and frisk); and (3) police car interrogation.

1. Home Interrogation

In dealing with interrogation in a suspect's home, the recent New York case of *People v. Allen*[30] is illuminating. Police officers went to defendant's home to arrest him for the rape of his mother-in-law. In the presence of defendant and his wife, without giving *Miranda's* fourfold warning, the police asked if Allen had raped the complainant. Denying the rape, Allen admitted having had intercourse with her, but maintained that she had consented. He was then arrested and taken to police headquarters. Supreme Court Judge Sobel, in holding the incriminating statement inadmissible, found irrelevant that only a single routine question was asked and held that the defendant had been questioned during a time when he was being deprived of his freedom in a significant way.[31] The question was designed to elicit a response that might have incriminated him, and under these facts the *Miranda* warning was required.

Judge Sobel also found unimportant that the question was asked prior to arrest, since "the defendant was not at such time free to go."[32] He interpreted *Miranda*

28 *Id.* at 395, 207 N.E.2d at 360, 259 N.Y.S.2d at 415.
29 Miranda v. Arizona, 384 U.S. 436, 495 (1966).
30 59 Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966).
31 *Id.* at 900, 272 N.Y.S.2d at 251-52. *But see* Duffy v. State, 243 Md. 425, 221 A.2d 653 (1966), where *Miranda* was held inapplicable to a suspect who was awakened by the police and asked whether a knife that was protruding from beneath the mattress on which he was lying was the knife used in a stabbing. The suspect then made incriminating statements. The court held that the defendant was neither under arrest nor being restrained in a significant way. He was merely accosted by the police, and such activity was not covered by *Miranda.* Although the Maryland court failed to mention it, this case apparently was tried before *Miranda* was decided; and if this be so, then under Johnson v. New Jersey, 384 U.S. 719 (1966), no warnings were required. One could not infer that Maryland was the first and probably only state to make *Miranda* retroactive, since the court makes no mention of the retroactivity problem. For an excellent analysis and exhaustive presentation of "custodial interrogation" under People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied,* 381 U.S. 937 (1965), see Graham, *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona,* 14 U.C.L.A. L. REV. 59 (1966).
32 59 Misc. 2d 897, 900, 272 N.Y.S.2d 249, 259 (Sup. Ct. 1966).

> to hold that the mere "fact of custody" is inherently "compulsive" in its Fifth Amendment sense, that as soon as a person is deprived of his "freedom of action" adversary proceedings commence and the privilege [against self-incrimination] protects him from questioning, routine or otherwise, which seeks to elicit a criminal [clue] or . . . fact.[33]

In determining whether there is such "restraint" or "significant restraint"[34] that the interrogation can be said to be custodial, what criteria should be used to determine whether there is in fact custodial interrogation outside the station house? The relevant criteria are the place, the nature of the questioning, and the effect on the suspect's mind, taking into consideration age, intelligence, experience, and other pertinent data. This test is a subjective one because we are concerned with the effect of the questioning in the suspect's mind. Compulsion for one may not be compulsion for another. In this context, the policeman's intent to arrest or whether he has sufficient probable cause to arrest is irrelevant.[35]

2. "Stop and Frisk" Laws

When a person's freedom of movement is restricted in a significant way, the *Miranda* warning must be given. Without such a warning a suspect may not be questioned. This Supreme Court mandate raises serious doubts concerning the constitutionality of the "stop and frisk" procedure. The New York Code of Criminal Procedure, which is declaratory of the common-law rule,[36] provides:

> A police officer may stop any person abroad in a public place who he reasonably suspects is committing, has committed or is about to commit a felony and may demand of him, his name, address and explanation of his action.[37]

A fact situation will best illustrate the problem. *X* and *Y*, at 12:30 A.M., decided to go for something to eat in their neighborhood (a high crime rate area). Before entering the restaurant, they looked through the windows and saw several persons whom they did not particularly care for. Continuing down the block, they had second thoughts and returned to the door. Without entering, they finally decided to go elsewhere. Having observed their activity, two police officers stopped them, and asked "What are you doing here?" Frightened, *X* and *Y* vaguely explained their activities. After continued police questioning both made incriminating statements.

Under the *Miranda* guidelines only spontaneous statements "given . . .

33 *Id.* at 904, 272 N.Y.S.2d at 255.

34 See note 14, *supra.*

35 *Cf.* People v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965), where the court, in determining whether an interrogation took place, did not think "a determination of the actual intent or the subjective purpose of the police in undertaking the interrogation" was instructive in this regard, 400 P.2d at 102, 43 Cal. Rptr. at 206. *Contra,* People v. Allen, 50 Misc. 2d 897, 905, 272 N.Y.S.2d 249, 256-57 (Sup. Ct. 1966).

36 People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964). See People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956). See generally Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942).

37 N.Y. CODE CRIM. PROC. § 180(a). Similar provisions can be found in Delaware, DEL. CODE ANN. tit. 11, § 1902 (1953); Massachusetts, MASS. GEN. LAWS ch. 41, § 98 (1966); New Hampshire, N.H. REV. STAT. ANN. § 594:2 (1955); Rhode Island, R.I. GEN. LAWS ANN. § 12-7-1 (1956).

voluntarily without any compelling influences"[38] are admissible in court. Any response that *X* and *Y* made, in view of the fact that they were not free to leave, was neither free from compulsion nor spontaneous in form. *X* and *Y* had been deprived of their freedom of movement in a significant way; under the New York statute they could not walk away from their interrogators, and the very manner of stopping someone late at night had an element of compulsion.

A purpose of the "stop and frisk" procedure is to place the suspects in a position to "readily . . . exculpate [incriminate would be more accurate] themselves"[39] and avoid arrest. However, the questions and the attendant circumstances are designed to intimidate and elicit incriminating statements, despite a suspect's absolute constitutional right to avoid them. Without the *Miranda* warning being given at the commencement of the "stop and frisk" procedure, it is submitted that any statement, even if it is exculpatory, will be inadmissible.

3. Police Car Interrogation

Any interrogation in a police car without warning and waiver clearly violates *Miranda*. The police car is an extension of the police station, whether a person has been arrested or has been merely brought in for questioning. Furthermore, requiring a suspect to sit silently in a police car between two officers can be classified only as intimidation and compulsion.[40] Any statement obtained under those conditions would be inadmissible under *Miranda*.

B. Necessity for Warning Despite Absence of Interrogation

Upon arrest, the police must immediately give the *Miranda* warning to the suspect.[41] The failure to do so will render inadmissible any statement subsequently obtained. Let us consider another hypothetical case: *B* was arrested at his apartment by two police officers. After placing him under arrest, one officer searched the apartment while the other stayed with *B*. Finding nothing and without saying anything, the two officers took him to their car and drove for forty-five minutes, finally arriving at the station house. He was then left alone in an interrogation room for two hours. Eventually, two police officers came into the room; upon seeing them, *B* confessed. Nothing was ever said to *B;* he was not interrogated. Under a narrow and restrictive reading of *Miranda* then, no warning need have been given. However, the fact remains that the atmosphere in which all this occurred was coercive, and there was a deliberate attempt to compel a confession although not a single question was asked. Allowing the police to adopt this and similar methods of compulsion would exalt form over substance and emasculate the *Miranda* guidelines. *Any* situation designed to elicit a statement or admission violates the constitutional mandate of *Miranda*.[42]

38 Miranda v. Arizona, 384 U.S. 436, 478 (1966).

39 People v. Peters, 18 N.Y.2d 238, 244, 219 N.E.2d 595, 599, 273 N.Y.S.2d 217, 222 (1966).

40 See hypothetical under "Necessity for Warning Despite Absence of Interrogation," discussed in text accompanying notes 41, 42 *infra*.

41 This is apparently the instruction given by the California Attorney General to local law enforcement officials. See Lynch, *Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona,* 35 FORDHAM L. REV. 221, 224 (1966).

42 Any police conduct, verbal or otherwise calculated to, expected to, or likely to

If immediately upon arrest or detention the police inform a suspect of his rights, the job of the police, district attorney, judges, and attorneys will be greatly facilitated. Failure to inform can only result in court imposition of further limitations on police practices that might otherwise be constitutionally permissible.

C. "Fruit of the Poisonous Tree" Doctrine as Applied to Custodial Interrogation

Chief Justice Warren in *Miranda* clearly indicated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation* can be used against him."[43] (Emphasis added.) In *Westover* the defendant had been in the custody of the local police for approximately fourteen hours, during which time he was subjected to extensive interrogation, although never informed of his rights. He was then turned over to agents of the Federal Bureau of Investigation, who, after warning him of his rights, pursued a new line of questioning in the same headquarters.[44] The Supreme Court held his subsequent confession inadmissible because the federal officers were the "beneficiaries of the pressure [previously] applied by the local in-custody interrogation."[45] Under these circumstances there can be no assumption that the defendant had intelligently waived his rights. In effect, the Court found the coercive atmosphere of the illegal interrogation to be the poisonous tree that yielded the fruit, the confession, secured by the F.B.I. The Chief Justice stated, however, that

> a different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original

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stimulate incriminating statements from one in custody would seem to fall within the term "custodial interrogation." Remarks of Yale Kamisar at *Escobedo — The Second Round Conference* held at Ann Arbor, Michigan, July 23, 1966. Examples of such conduct are showing the murder weapon, placing evidence of the crime in front of the suspect, or playing a tape of an accomplice implicating the suspect. *Cf.* Fahy v. Connecticut, 375 U.S. 85 (1963); People v. Stoner, 35 U.S.L. WEEK 2442 (Cal. Jan. 26, 1967). Confronting the suspect with his alleged accomplice or bringing in a member of the suspect's family is similar impermissible conduct.

43 Miranda v. Arizona, 384 U.S. 436, 479 (1966).

44 *Id.* at 494-95.

45 *Id.* at 497. Justice Clark, who dissented, wrote that "failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof." *Id.* at 500. Justice Harlan's dissenting opinion also intimates that the fruits of a *Miranda* violation must be excluded. *Id.* at 522. Justice White's dissenting opinion is the only one of the four written opinions that appears to indicate the question remains an open one. *Id.* at 545. In his concurring opinion in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), Justice White wrote: "A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege." *Id.* at 103. The concurrence goes on to discuss how we determine what is or is not a fruit of the poisonous tree with the explicit assumption that a coerced confession is such a tree. In view of his concurrence in *Murphy* and a close reading of his dissent in *Miranda,* Justice White appears to be "leaving open" the "factual" question of when subsequent evidence is *actually* the "fruit of the poisonous tree."

It is true, however, that the majority opinion does not *specifically* enunciate a derivative evidence rule for confessions. See GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 123 (1966). This same commentator maintains that such an important question cannot be said to have been decided in such a cursory manner and the question, for the present at least, remains an open one. George, *Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona,* 35 FORDHAM L. REV. 193 (1966).

> surroundings, and then adequately advised of his rights and given an opportunity to exercise them.[46]

To put it another way, to be admissible the evidence must have been obtained by means "sufficiently distinguishable to be purged of the primary taint."[47]

This "fruit of the poisonous tree" doctrine has been held applicable to verbal or tangible evidence obtained as a result of an illegal arrest,[48] illegal detention[49] or unlawful search and seizure.[50] When a confession is obtained without a prior warning or waiver, *any evidence* derived as a result of the compelled testimony, will be inadmissible in a court of law.[51] Since the cornerstone of *Miranda* is the privilege against self-incrimination, the independent-evidence

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46 384 U.S. 436, 496.

47 Wong Sun v. United States, 371 U.S. 471, 488 (1963). See generally Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483 (1963).

48 Wong Sun v. United States, *supra* note 47, at 485.

49 Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1959), wherein the court discussed the reason for the rule:

> In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no . . . advantage in building a case against the accused. *Id.* at 467.

50 Fahy v. Connecticut, 375 U.S. 85 (1963). See generally HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 108-10 (2d ed. 1966).

51 See United States v. Bayer, 331 U.S. 532 (1947), where the Court wrote:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.

In such a sense a later confession always may be looked upon as fruit of the first. *Id.* at 540. If we end the discussion at this point, the proposition could stand. However, the Court continued:

> But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases . . . did not deal with confessions but with evidence of a quite different category and do not control this question. *Id.* at 540-41.

The standard by which a second confession will be judged is whether the coercive influences causing the initial involuntary confession have been removed or remain to make the subsequent confession involuntary as well. *Ibid.* See Leyra v. Denno, 347 U.S. 556 (1954); Stroble v. California, 343 U.S. 181 (1952); Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596 (1944). See generally Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements; a Dialogue on a Neglected Area of Criminal Procedure,* 1961 U. ILL. L.F. 78, 98-105.

Some courts have held that an illegally obtained confession creates a rebuttable presumption that all "subsequent confessions are tainted by the continuing influence of the first illegality." Killough v. United States, 315 F.2d 241, 249 (D.C. Cir. 1962), relying on Leyra v. Denno, *supra.* The more recent decisions of Fahy v. Connecticut, 375 U.S. 85 (1963) and Wong Sun v. United States, 371 U.S. 471 (1963), although not dealing with coerced confessions, lend support to a standard where the question is whether the defendant would have confessed if there had been no illegality. This test leads inescapably to the conclusion that an illegally obtained confession will always be the parent of a second confession. Of course, if an accused's lawyer is permitted to inform him that the first confession is inadmissible and cannot be used against him, a different result might follow. This would be true only if the accused prior to any subsequent interrogation is given the *Miranda* warning and his lawyer is present during such questioning.

Witnesses discovered as the result of an illegally obtained confession may or may not be usable by the prosecution depending on the degree of "attenuation." Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963). However, when a witness is discovered as the direct result of an illegality, he will not be permitted to testify. People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942).

test of *Murphy v. Waterfront Comm'n*[52] appears applicable. The police would, therefore, have the burden of establishing that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence,"[53] namely, a source other than the confession or statement. If the police were permitted to utilize illegally obtained confessions for links and leads, the *Miranda* guidelines would be of no value in protecting the privilege against self-incrimination[54] because the police could then do indirectly what they cannot do directly.[55] Whether the police might have eventually discovered the evidence is irrelevant; the sole test is whether they have exploited the primary illegality or obtained the evidence by means "sufficiently distinguishable to be purged of the primary taint."[56] The derivative-evidence rule results in leaving the suspect in substantially the same position as if he had been advised of his rights and had exercised his privilege against self-incrimination.[57]

D. Waiver Generally

In every interrogation, the critical question is whether there was an effective waiver. The principles governing waiver are these:

1. It has no application or effect until the suspect is in custody or his freedom of movement is restrained in a significant way;[58]
2. It must follow a clear and well-articulated fourfold warning as to his rights;[59]
3. It must precede questioning (such questioning includes even the most subtle invitation to speak);[60]
4. It must be an intelligent and understanding one;[61] and
5. It may be withdrawn or renewed at any time.[62]

A waiver will not be presumed from mere silence.[63] The testimony of a police officer in conclusive terms that a waiver was given will be insufficient to overcome the presumption against waiver.[64] The prosecution's burden of

52 378 U.S. 52 (1964).
53 *Id.* at 79 n.18.
54 See SOBEL, THE NEW CONFESSION STANDARDS "MIRANDA v. ARIZONA" 103 (1966); Nedrud, *The New Fifth Amendment Concept: Self-Incrimination Redefined*, 2 NAT'L DIST. ATT'YS ASS'N J. 113, 114 (1966). See generally Broeder, *supra* note 47; see Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199, 216-18 (1966).
55 California's Supreme Court recognized this argument in applying the "fruit of the poisonous tree" doctrine to confessions obtained in violation of the requirements of People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937 (1965), which required the police to warn a suspect affirmatively of his right to counsel. People v. Buchanan, 63 Cal. 2d 880, 409 P.2d 957, 48 Cal. Rptr. 733 (1966).
56 Wong Sun v. United States, 371 U.S. 471, 448 (1963).
57 Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-80 (1964).
58 Miranda v. Arizona, 384 U.S. 436, 477 (1966).
59 *Id.* at 467-73, 476.
60 *Id.* at 471, 474.
61 *Id.* at 475.
62 *Id.* at 474, 479.
63 Carnley v. Cochran, 369 U.S. 506, 516 (1962).
64 See GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 120 (1966). This author suggests there may even be a presumption of perjury on the part of the police when they testify about warnings. In Carnley v. Cochran, *supra* note 63, the Supreme Court in enunciating standards for judicial waiver stated: "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.* at 516. It thus becomes incumbent upon the police to have affirmative evidence that the

proving an intelligent waiver is a heavy one,[65] equivalent to proof beyond a reasonable doubt. Nevertheless, if a lawyer is not present during the interrogation and there has been no intelligent waiver after the warning has been given, no effective confession, admission, or other statement can result.

It seems virtually impossible, then, to find, much less prove, a waiver of the right not to be compelled to incriminate oneself and the right to have the presence and assistance of counsel during the interrogation. As Mr. Justice Black observed:

> The doctrine of waiver seems to be a more palatable but equally effective device for whittling away the protection afforded by the privilege . . . . Of course, it has never been doubted that a constitutional right could be *intentionally* relinquished . . . but we have said that intention to waive the privilege against self-incrimination is not "lightly to be inferred."[66]

Miranda mandates that the individual must rationally and intelligently make an election whether to incriminate himself and to abandon the right to the presence of counsel. After a suspect has spoken to an attorney, no questioning may take place without an attorney being present unless there is a waiver, and an extensive interrogation before a statement is made will rebut any contention that a claimed waiver was made knowingly and intelligently.[67]

There are considerable variations of the standard warning itself. Something like

> I want you to understand that anything you say to us will be on the record and could be used against you, so if you want to talk to a lawyer first, get his advice, we'll call anyone you want, or we'll get a lawyer for your protection if you can't afford one

would not have the same effect as the terse "Anything-you-say-may-be-held-against-you-it's-your-constitutional-right-to-have-the-aid-of-c o u n s e l-and-invoke-your-privilege-against-self-incrimination-under-the-5th-6th-and-14th-amendments." The warning must be clear and concise and convey to the suspect exactly what he will surrender by waiving his rights.

In order to be waived, rights must be known. It appears that the only admissible confession made after waiver will be one made with an understanding of the rights being waived, as well as the implications of waiving them, and by a suspect who freely desires to confess. Since counsel is guaranteed for the

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warning was given and the suspect affirmatively waived his rights. There need be no worry over a "swearing" contest between the police and the suspect. The testimony of a police officer unaccompanied by any corroborating evidence is insufficient per se to prove waiver.

Since we are dealing with the "voluntariness" of the waiver, it would appear that the burden of proof would be the same required under the old "voluntariness test." Although Jackson v. Denno, 378 U.S. 368, 388 (1964), does not explicitly state what burden is on the prosecution, apparently proof beyond a reasonable doubt was required. See People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

65 Miranda v. Arizona, 384 U.S. 436, 475 (1966).

66 Rogers v. United States, 340 U.S. 367, 376-77 (1951) (dissenting opinion).

67 Miranda v. Arizona, 384 U.S. 436, 476 (1966). In addition any lengthy incommunicado incarceration is strong evidence of an invalid waiver. This may be the basis for a *McNabb-Mallory* prompt arraignment concept in order to protect the individual further.

purpose of protecting the defendant from his own ignorance,[68] it is in a sense illogical to allow him to relinquish a measure provided for his own protection. Thus, there is always a strong, if not conclusive, presumption against waiver unless there is an absence of "subverting factors" and the presence of a reasoned and free choice.[69]

Forgoing the privilege against self-incrimination can be the result of either compulsion or waiver. The absence of compulsion, however, does not imply the presence of waiver. The crucial question is whether the waiver was the choice of a free will, was made without compulsion of any kind, and was made "knowingly and intelligently."[70]

It is obvious, therefore, that one question the courts face is whether, under the circumstances, the particular person could have competently and intelligently waived his rights. The characteristics of the person interrogated will be a significant if not determinative factor in evaluating the effectiveness of the waiver. Age, mentality, experience, education, language fluency, and health should play crucial roles in determining whether the waiver was intelligent and voluntary. In discussing the probability of a fifteen-year-old boy intelligently waiving his rights, the Supreme Court said:

> But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, *would have a full appreciation of that advice* . . . . Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements.[71] (Emphasis added.)

In dealing with a youth, the police would be wise to provide counsel immediately or contact the child's parents and have them come to the station house. Of course, the parents cannot waive their child's rights, and it is arguable that only a lawyer or judge could adequately protect and inform a youthful suspect.

Merely giving the standard warning does not permit an inference that the waiver was knowing and intelligent. The warning does not itself apprise the suspect of the consequences, and without such knowledge the waiver cannot be intelligent.[72] The suspect can be informed of his rights most effectively by someone versed in the law. Consequently, if the warning were given by a lawyer, the likelihood that the warning would be comprehensible to the suspect would be increased. The giving of the warning and any interrogation subsequent to waiver should be preserved by videotape or magnetic tape. Whether there is an intelligent and knowing waiver before interrogation begins can best be determined by an impartial arbiter rather than by those doing the interro-

68 See People v. Dorado, 398 P.2d 361, 369-70, 42 Cal. Rptr. 169, 177-78 (1965).
69 Van Moltke v. Gillies, 332 U.S. 708, 729 (1947) (Frankfurter, J. concurring).
70 Miranda v. Arizona, 384 U.S. 436, 475 (1966). Responding to interrogation does not imply waiver, since the suspect may call a halt at any time, *id.* at 474; nor does confessing imply waiver. Escobedo v. Illinois, 378 U.S. 478 (1964). Lack of request to see an attorney and lack of counsel after it has been offered do not imply waiver. Carnley v. Cochran, 369 U.S. 506 (1962).
71 Haley v. Ohio, 332 U.S. 596, 601 (1948).
72 Those most likely to incriminate themselves, the indigent and ignorant, are the ones most in need of counsel.

gating. Thus, a warning issued by a magistrate also would be preferable to one issued by a police officer.[73]

Nor can an effective waiver be obtained by trickery and cajolery. As one's ability to waive rights becomes more and more limited, the rights should be more zealously guarded by courts against claims of waiver. *Miranda* demonstrates that it becomes almost impossible to have a binding waiver because (1) it is not binding if the suspect can always change his mind and stop talking or ask for a lawyer, and (2) the methods of showing that the alleged waiver was not intelligent or informed are virtually limitless.

E. Retained Counsel and Waiver

An interesting situation suggests itself when a suspect is brought to police headquarters and a lawyer retained by his parents arrives prior to any questioning. Assume that although the police give the standard warning, they deliberately fail to inform the suspect of the lawyer's presence. The accused "waives" his rights and, after interrogation, confesses. In speaking for the *Miranda* majority, Chief Justice Warren asserted that where the police prevent an attorney from consulting with his client, "independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake."[74] The failure to advise a suspect that his family has retained a lawyer "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime,"[75] and it denies him sufficient information to permit an intelligent and knowing waiver.

Assuming the suspect's lawyer (retained by his parents) had not arrived until after the accused had "waived" his rights, must the police thereupon inform him of the lawyer's arrival and abstain from or cease questioning him? The answer to this question must be "yes" if we are to attribute any truly *significant* meaning to *Miranda*. A ritualistic warning is insufficient;[76] the accused has a right to know all the circumstances affecting the relinquishment of his rights. If the police do not inform the suspect of the presence of the attorney, the waiver cannot be said to have been an intelligent and understanding one since it was given without knowledge of all the relevant facts.

It may be argued, the language quoted from *Miranda* notwithstanding,[77] that after a suspect has been emphatically and unequivocally advised of his right to retained or appointed counsel and he still decides to speak, any resulting confession is admissible even if the suspect has been denied consultation with his waiting attorney, whether the attorney's arrival at the scene of interrogation was before, during, or after the warning. Underlying this argument are the assumptions that the police will give the requisite warnings clearly

73 If the suspect waives his rights, it might even be preferable for the magistrate to question him in "open court" rather than return him to the "backroom" for interrogation. See Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

74 Miranda v. Arizona, 384 U.S. 436, 465 n.35 (1966).

75 People v. Donovan, 13 N.Y.2d 148, 153, 193 N.E.2d 628, 630, 243 N.Y.S.2d 841, 844 (1963).

76 Miranda v. Arizona, 384 U.S. 436, 476 (1966).

77 See text accompanying note 74, *supra*.

and unequivocally, and that the suspect will fully understand them. There is an air of unreality to this, for

> when we expect the police dutifully to notify a suspect of the very means he may utilize to frustrate them — when we rely on them to advise a suspect unbegrudgingly and unequivocally of the very rights he is being counted on *not* to assert — we demand too much of even our best officers.[78]

There is no one better qualified than an attorney to advise a suspect of his rights, for he is the one with the suspect's interests foremost in mind. Although the lawyer does not have a constitutional right to consult with his client, the requirements of substantial justice demand, at the very least, that in their warning the police inform the accused that he has a lawyer outside who desires to speak with him. "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law,"[79] and the constitutional requirement of the assistance of counsel should be maximized rather than minimized. Where is the logic in denying a lawyer the opportunity to warn his client fully, unequivocally, and effectively of the consequences of police questioning? If we are truly concerned that a trial not be a mere ritual after conviction has been assured in the back room of the police station, where is the logic in preventing an attorney, under *any* circumstances, from advising his client? If the standard for waiver in the police station is as *Miranda* dictates, *i.e.*, the same as that required in the courtroom, how can the police in any way prevent a suspect from consulting with his attorney? After all, if the attorney has the obligation at the trial of fully discussing with his client the possible consequences of his taking the stand, does he not have the obligation at the station house of discussing the possible consequences of his answering police interrogatories?

> As the English experience . . . indicates, any rule which requires a caution inevitably invites avoidance. . . . [T]he probable conflict of testimony about whether a required caution was in fact given makes satisfactory judicial enforcement doubtful. Any rule requiring a warning is also likely to be ineffectual since the significance and effect of a warning depend primarily on emphasis and the spirit in which it is given. A warning can easily become a meaningless ritual.[80]

So long as the warning is given in the same coercive atmosphere where the "voluntary" confession was obtained, the emphasis will shift to police handbooks on how to obtain a "voluntary" waiver.[81]

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78 Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 35-36 (1965).

> The constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. Van Moltke v. Gillies, 332 U.S. 708, 725-26 (1947).

79 Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

80 Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View* in POLICE POWER AND INDIVIDUAL FREEDOM 153, 175 (Sowle ed. 1962).

81 See Thompson, *Detention After Arrest and In-Custody Investigation: Some Exclusionary Principles*, 1966 U. ILL. L.F. 390, 421.

The question, then, is whether it is the "duty of the police to persuade the suspect to talk or persuade him not to talk. They cannot be expected to do both."[82] Intimidation and coercion inhere in a police officer's badge, gun, and uniform. Moreover, "can there be any doubt that many a 'subject' will *assume* [even after he is told that they do not] that the police have a legal right to an answer?"[83] Failure to permit a retained lawyer to advise his client will make the policy of warnings beneficial only to the literate, affluent, or sophisticated individual. Inherent intimidation will remain, because the usual suspect, especially the illiterate or non-English-speaking individual, is so frightened and confused that he cannot fully comprehend the police warnings. Indeed, one of the most active spokesmen for the prosecution-oriented community has recognized "the improbability, if not impossibility of an intelligent waiver of the Fifth Amendment privilege."[84]

One of the more subtle ways to mislead the suspect is to inform him that if he agrees to speak he may stop the questioning at any time. The consequence of such an addition is to reduce the overall effectiveness of the required warnings by encouraging waiver. The warning should be as neutral as possible, and if the police are truly concerned that the suspect may be unaware that he may halt any interrogation, let this warning be given after an affirmative waiver when the suspect is ready to answer questions. There is a possibility that, even after invocation of the privilege, the police may attempt to subvert the suspect's decision to remain silent.

It has been suggested by a most unlikely source that, despite the language in *Miranda* clearly indicating an independent constitutional violation when retained counsel is denied access to his client,[85] the police need not permit a suspect to consult with his lawyer if they themselves advise the suspect in accordance with the *Miranda* requirements.[86] Professor Kamisar argues that, although the Court was aware of the contention that a person in police custody should not be able to waive his constitutional rights without the *presence* of counsel because the party alleging waiver has control of the party alleged to have waived, the rules it prescribed do permit such waiver in the absence of counsel.[87] According to Kamisar, to read the language in the Court's footnote 35[88] as granting the lawyer retained by friends or relations (not by the suspect himself) an absolute, automatic right to see his "client" who has not asked for a lawyer and is unaware that he even has one is to prevent such suspects from

82 Brief of Edward L. Barrett, Jr. as Amicus Curiae, p. 9, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (on rehearing).

83 Kamisar, *op. cit. supra* note 78, at 31.

84 Kuh, *Developments in Criminal Law — Problems of Police Interrogation*, in PROCEEDINGS, CONFERENCE OF STATE GOVERNMENTS 51 (Council of State Gov'ts 1966). This was a speech delivered at the Conference of Chief Justices held in Montreal, Canada, Aug. 3-6, 1966 (on file at the University of Michigan Law Library).

85 Miranda v. Arizona, 384 U.S. 436, 465 n.35 (1966).

86 Kamisar, *Miranda v. Arizona: Some Comments on the Old New Fifth Amendment*, in PROCEEDINGS, *op. cit. supra* note 84, at 47.

87 *Ibid.*

88 The police also prevented the attorney [in *Escobedo*] from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. Miranda v. Arizona, 384 U.S. 436, 465 n.35 (1966).

waiving their rights in the absence of counsel and is, in effect, to say that the "realities" of police station proceedings are such that the *Miranda* warnings alone do not provide adequate protection if issued by police officers. But, as Professor Kamisar interprets *Miranda*, rightly or wrongly, the Supreme Court is, for now at any rate, operating on the premise that these warnings can provide adequate protection, even though issued by police officers.[89]

If confidence in police-issued *Miranda* warnings is unwarranted, then, reasons Kamisar, *every* suspect, not only the suspect who is *well connected* or fortunate enough to have friends or relatives who rush a lawyer down to the station house, should be entitled to the presence and advice of counsel *in order to decide* whether to waive counsel and his "right to remain silent." At this point, however, footnote 35 threatens to engulf the whole opinion; for as he reads *Miranda*, it permits the police to obtain incriminating statements from *duly warned* suspects who "want to get it off their chest," but whose lawyers would often persuade them to "keep it inside."

As the authors see it, to couch the problem in terms of the right of an attorney to consult with his client is misleading. Rather, the question is whether a suspect whose family has obtained counsel is entitled to be informed of this fact before a knowing and intelligent waiver can be made? Even assuming a valid "waiver" has occurred before counsel reaches the station house, are the police, after commencing an interrogation, obliged to inform the suspect that a lawyer retained by his family is outside and wishes to speak with him? To these questions footnote 35 and the sixth amendment provide the answer and it is *yes!*

Thus we are offered the rule of construction, that where a broad maxim is urged on the Court but it adopts a "narrow view" (assuming one can seriously argue that requiring the appointment of counsel at the interrogation stage is a narrow view), then until further word from the Court the police are entitled to operate on the premise that there has been a rejection of the more encompassing maxim. Although there is some validity to what has been suggested, the emanations from the majority opinion are not as hazy as some would have us believe.[90] Throughout the opinion the Court was concerned with the fifth amendment's privilege against self-incrimination, and the rules it enunciated are designed to inform the suspect of this privilege. When we speak of an attorney being present at the station house to consult with his client, we are

89 But why shouldn't the footnote be taken for what it *clearly* says? For however general or vague some of the language of the Court is in certain places, one would have to say that *Miranda* was a very carefully considered opinion. For example, the majority opinion cites Justice Brandeis's dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485 (1928), but Chief Justice Warren is very careful to indicate that the citation of Justice Brandeis is not to be construed as passing on the merits of *Olmstead*. Miranda v. Arizona, *supra* note 88, at 480 n.49.

90 Miranda v. Arizona, *supra* note 88, at 465 n.35 (1966). The footnote clearly governs a specific situation, and for it to be viewed as unfortunate or merely dicta is to take a narrow and restrictive approach to an opinion that is no way narrow and restrictive. Such a reading is similar to state courts' reading of *Escobedo*, Rothblatt, *Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation*, 17 HASTINGS L.J. 41 (1965), a course which resulted in much confusion and directly contributed to the new and broad constitutional mandate of *Miranda*. For a discussion of why the footnote means what it says, see text *supra* and accompanying notes 86-89.

concerned with the sixth amendment's right to counsel. Nowhere does the majority opinion discuss the sixth amendment independently of the fifth, except when the opinion asserts that, where the police prevent an attorney from consulting with his client, this action "independent of any other constitutional proscription . . . constitutes a *violation of the Sixth Amendment right to the assistance of counsel.*"[91] (Emphasis added.) Thus, the Court clearly indicated that, regardless of any other methods necessary to protect the fifth amendment privilege, when the police prevent consultation there is an independent sixth amendment violation.[92]

What of the individual who is not fortunate or sophisticated enough to retain counsel in advance or whose family has neither the money nor the opportunity to do so for him? Are we to cease construction on the road that *Gideon v. Wainwright,*[93] *Douglas v. California,*[94] *Griffin v. California,*[95] and *Miranda* have begun? Are we now to accept the view that there is no constitutional or moral obligation to supply a lawyer to give a truly effective warning? Or are we to succumb to a new line of reasoning that the fortunate individual should be denied his lawyer's warning because, if we permit that warning, the state will have to supply a lawyer to inform the unfortunate suspect? It is difficult to believe that anyone could seriously argue that to effectuate equal justice under law we must restrict rather than expand the scope of constitutional rights.

The mandate of the sixth amendment provides for the effective assistance of counsel. The Supreme Court uses this right of counsel to implement the fifth amendment's protection against self-incrimination. Effective assistance of counsel requires nothing less than a retained lawyer being permitted to advise his client. It is submitted that this is the only realistic interpretation of what may become one of the most discussed footnotes in the history of the law. Once the affluent are guaranteed a warning by their own counsel, the "denial of counsel to the indigent . . . while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation . . . in *Gideon v. Wainwright, . . . Douglas v. California*"[96] and now *Miranda v. Arizona.*

IV. Conclusion

The results of *Miranda* can lead only to better law enforcement procedures, not the "handcuffing of the police."[97] The suspect is either innocent, guilty, or

91 Miranda v. Arizona, *supra* note 88, at 465 n.35.
92 *Ibid.*
93 372 U.S. 335 (1963).
94 372 U.S. 353 (1963).
95 380 U.S. 609 (1965).
96 Miranda v. Arizona, 384 U.S. 436, 472-73 (1966).
97 In a post-*Miranda* survey of more than 1,000 cases in which the accused had made an incriminating statement, Los Angeles District Attorney Evelle Younger indicated that the percentage of cases in which confessions or admissions were made have not decreased, as might have been anticipated, because of the increased scope of the admonition required by *Miranda.* Office of the District Attorney, County of Los Angeles, Dorado-Miranda Survey (Aug. 4, 1966), reported in N.Y. Times, Aug. 19, 1966, p. 20, col. 3, reprinted at 35 FORDHAM L. REV. 255 (1966). New York's experience with the warnings is subject to conflicting interpretations. The commanding officer of one Manhattan detective squad reported that "by and large . . . [suspects] readily admit what they've been doing even after they've been

in some way connected with the crime. Of course, if he is guilty or in circumstances in which he is likely to incriminate himself,[98] "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[99] Nevertheless, with the accused's consent, an attorney is not prevented from furnishing information valuable in apprehending others. Even if no information is furnished, the police are still in a position to gather independent evidence of the suspect's guilt.

If the suspect is innocent and can readily explain his position, the lawyer would and should encourage him to cooperate with the police to explain his innocence.[100] If the explanation is accepted, an innocent man will be out of the criminal process as early as possible. If the individual is guilty or might easily incriminate himself, but there is a likelihood that *extraconfessional* evidence will still convict him, the lawyer may well instruct him to confess in order to get more favorable treatment. If the individual is guilty or was in incriminating circumstances, but cannot be convicted aside from "his own mouth," of course, he will be told not to speak; but that advice implements the very purpose of the fifth amendment. That is what *Miranda* is all about.[101]

There are several options available to law enforcement officers. They can attempt to circumvent, emasculate, or ignore the constitutional mandates of *Miranda*.[102] On the other hand, full and genuine compliance with the enunciated rules can serve both to enhance respect for the law and police officers and to strengthen and facilitate law enforcement throughout the United States.

Respect for law, which is a fundamental prerequisite of law enforcement, can hardly be expected of the people if the officers charged with its enforcement do not set the example of obedience to its precepts.[103] If they fail, the resulting alienation of the public would lead to a lack of cooperation. In a democratic society the police must conduct themselves in accordance with the requirements of human dignity and individual freedom. We are in the midst of a second American Revolution where

> our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . To declare that in the

told of their rights." N.Y. Times, June 25, 1966, § 1, p. 1, col. 6. Another detective squad commander indicated that *Miranda* had "not weakened law enforcement." N.Y. Times, Aug. 13, 1966, p. 1, col. 1. Nevertheless, Brooklyn District Attorney Aaron Koota claimed that the new rules had "shackled" law enforcement, *ibid.*, and that there was a sharp increase of refusals to speak after *Miranda*. N.Y. Times, Sept. 5, 1966, p. 17, col. 1.

98 See GRISWOLD, THE FIFTH AMENDMENT TODAY 9-15 (1955).

99 Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part, dissenting in part).

100 Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination . . . . Brief for ACLU as Amicus Curiae (in *Miranda, Westover, Vignera* and *Stewart*), p. 23. See also Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 OHIO ST. L.J. 449 (1964).

101 See GRISWOLD, *op. cit. supra* note 98, at 9-18.

102 For a discussion of court interpretations attempting to limit the scope of *Escobedo,* see Rothblatt, *supra* note 90.

103 See Bazelon, *Law, Morality, and Civil Liberties,* 12 U.C.L.A.L. REV. 13, 28 (1964).

> administration of the criminal law the end justifies the means . . . would bring terrible retribution.[104]

Only through the scrupulous observance of constitutional rights of citizens and the mutual cooperation of law enforcement officials and defense attorneys can our system of criminal justice provide effective law enforcement and at the same time preserve human rights and dignity.

104 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).